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Frank D. Watkins and Venia Watkins v. Glen M. Simonds and Beverly J. Simonds : Brief of Respondents

Utah Supreme Court

Sumner J. Hatch; Attorneys for Defendants and Respondents;

Case No. 9131

In the Supreme Court of the State of Utah

FRANK D. WATKINS and VENIA WATKINS,

Plaintiffs and Appellants,

—vs.—

GLEN M. SIMONDS and BEVERLY J. SIMONDS,

Defendants and Respondents.

BRIEF OF RESPONDENTS

SUMNER J. HATCH
Attorney for Defendants and Respondents

409 Boston Building
Salt Lake City 11, Utah

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STATEMENT OF THE CASE

The plaintiffs brought an action on June 12, 1958, to restrain defendants from blocking the flow of water through a certain ditch on the defendants' property and to require them to clear said ditch and enjoin future blocking of said ditch.

A temporary restraining order was issued and after a hearing on the order, the court took the matter under advisement on June 16, 1958. Judge Martin M. Larson

at that time refused to require the removal of the obstruction until September 10, 1958, when Judge Larson entered an order continuing the restraining order, and on September 26, 1958, entered a further order allowing the plaintiffs to open the ditch until the matter was heard on its merits.

The defendants moved for summary judgment and subsequently plaintiffs filed an amended complaint which was answered by the defendants. Plaintiffs also filed a motion for summary judgment. The motions were noticed by the defendant and were heard by the court on July 16, 1959. Defendants' motion for summary judgment was granted, plaintiffs' motion dismissed, and the summary judgment entered on July 31, 1959.

The plaintiffs filed a second amended complaint without leave of court, and on the 11th day of August, 1959, filed a motion to set aside judgment, to amend and to maintain the status quo.

The court refused the ex parte application of the plaintiffs to set aside judgment, and denied leave to amend on the same date. On the 24th day of August, 1959, plaintiffs filed a motion for new trial (R. 57) and a motion to alter summary judgment and to amend (R. 58). Both motions were denied by the court in an order dated August 31, 1959. On August 29, 1959, plaintiffs filed a notice of appeal.

Prior to the entry of summary judgment on July 31, 1959, the court considered the memoranda submitted at

the request of the plaintiffs and without objection by the defendants, said memoranda being to clarify plaintiffs' contention as to the facts set forth in the first amended complaint which were taken as admitted by defendants for purposes of the summary judgment.

STATEMENT OF THE FACTS

This statement of facts is set forth as taken from plaintiffs' amended complaint (R. 12-19) and the plaintiffs' memoranda (R. 40-50), together with plaintiffs' diagram (R. 50), and not as reconstructed and altered in plaintiffs' brief.

The parties are owners of Lots 6 (plaintiffs') and 3 (defendants'), Block 2, Holladay Heights Plat "A", Salt Lake County. Plaintiffs acquired Lot 6 through various conveyances from Alliance Realty Company, who conveyed to plaintiffs' predecessor on December 19, 1950 (R. 41). Alliance Realty Company had not yet acquired Lot 3, which was acquired on July 20, 1951, and conveyed to defendants' predecessor on December 31, 1952 (see plaintiffs' memoranda, R. 41).

In 1950 and previous thereto, water had come to Lot 6 by a ditch along the south side of Block 1, Holladay Heights Plat "A", along Lots 5 to 8 of said Block 1, thence north along the east side of Lot 6, Block 2, and north along a line near the center of Block 2 to Lincoln Lane, see plaintiffs' amended complaint, paragraph 3(c) (R. 13) and Plat (R. 50), "blue" route.

After Clover Lane was established subsequent in 1950, the water came to Lot 6 by the "red" route, plaintiffs' amended complaint, 3(d) (R. 13) and Plat (R. 50). On or about July 1, 1952, the ditch in dispute was constructed, plaintiffs' amended complaint, 4(a), (R. 13). The ditch in dispute was never used to bring water to Lot 6 until 1955, plaintiffs' amended complaint, 4(b) (R. 14). The water would be more accessible to Lot 6 by the original route existing at the time of dedication of the subdivision (R. 50), "blue" route.

STATEMENT OF POINTS

POINT I

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENTS TO THE DEFENDANTS.

POINT II

THE DISTRICT COURT DID NOT ERR IN REFUSING TO PERMIT PLAINTIFFS TO AMEND THEIR COMPLAINT FOLLOWING SUMMARY JUDGMENT.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENTS TO THE DEFENDANTS.

First Cause of Action

The court having taken the allegations of plaintiffs' amended complaint as admitted on July 16, 1959, and having allowed the plaintiffs to present a memorandum to cure inconsistencies and a plat showing the water

routes, did not err in granting the defendants' motion for summary judgment, the plaintiffs' pleadings and memoranda showing clearly (a) that at the time plaintiffs purchased through their predecessor Ford, there was no ditch in use where the disputed channel lies, plaintiffs' amended complaint, 4(a) (R. 13 and 14), and (b) prior to 1955 water had never come to Lot 6 across the west side of Lot 3, plaintiffs' amended complaint, 4(b) (R. 13).

Second Cause of Action

Plaintiffs' second cause of action incorporates the first cause which shows the present ditch used only since 1955, giving no prescriptive rights, plaintiffs' amended complaint, 4(b) (R. 14) and plat (R. 15).

Third Cause of Action

Plaintiffs' pleadings affirmative show that since the time of dedication of the subdivision the water has come to Lot 6 by three distinct routes, two of which are more accessible to the source of the water than the route over which plaintiffs claim a right-of-way (Plat, R. 50). Further, the shares of water owned by the plaintiffs are shares in a private irrigation company, plaintiffs' amended complaint, 2(b) (R. 12), and as such, are by statute not appurtenant to the land, 73-1-10, Utah Code Annotated 1953.

Fourth and Fifth Causes of Action

The fourth and fifth causes of action of the plaintiffs' amended complaint (R. 12-18) are moot.

The District Court took the matter of summary judgment under advisement on July 16, 1959, and at plaintiffs' request allowed plaintiff to file a memorandum prior to ruling. In the memorandum, plaintiffs set forth facts uncontested by the defendants which showed both parties' chain of title (plaintiffs' memorandum, R. 41) showing that Alliance Realty Company had acquired and disposed of Lot 6 prior to acquiring Lot 3. Lot 6 was sold to Carl Ford by Alliance on December 19, 1950, and Lot 3 was not acquired by Alliance Realty until July 20, 1951.

In July of 1952, when the ditch was constructed, plaintiffs' amended complaint, 4(a) (R. 13), Carl Ford owned Lot 6 and Alliance Realty owned Lot 3, hence no unity of title while the ditch was in use.

The complaint and the memoranda set forth that the water came to Lot 6 prior to 1955 by the "red" route (R. 50), and in spite of this plaintiffs alleged that the ditch on the west of Lot 3 was obvious, visible and in continual use when the defendant took title to Lot 3 in 1955. Either one position or the other is untenable.

In plaintiffs' brief various cases are cited purporting to uphold their amended complaint. Said cases are cited and discussed both in plaintiffs' brief and in the plaintiffs' memorandum which is made a part of the

record before this court. All cases are readily distinguishable from the case at bar. Adamson v. Brockbank, 112 Utah 52, 185 P(2d) 264, which sets forth various elements which plaintiffs claim fit the instant case, is a case where the Brockbank holdings carried a servitude with the Adamson holdings being the dominant estate. There is a direct privity between the grantor to each party and the parties involved in the lawsuit. The ditch in that case had been in continuous use, and Brockbank was enough aware of that use and the servitude arising from the ditch that he had fraudulently acquired a quit-claim deed to that easement. The Brockbank case set forth the essential elements to constitute an easement by severance as follows:

> (1) Unity of title followed by severance;
>
> (2) That at the time of the severance the servitude was apparent, obvious, and visible;
>
> (3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and
>
> (4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.

With respect to unity of title at severance: In the instant case at the time of severance according to plaintiffs' facts, the ditch was running along the "blue" route (R. 50), and ran from the present site of Lot 6 to the present site of Lot 3, and there was at that time no servitude in Lot 3 and no dominant estate in Lot 6 creating a servitude in Lot 3.

Plaintiffs allege a unity of title at the time of conveyance of Lot 6, complaint, paragraph 5(a) (R. 14), but rebut said unity in the chain of title set forth by plaintiffs (R. 41).

They claim obvious notice to the defendant of a servitude by alleging subdividing and dedication of a subdivision in 1947 (R. 41), severance in 1950 (R. 41), and then allege construction of a ditch in 1952, and still claim an obvious and visible servitude (plaintiffs' brief, page 8).

Again in Phillips v. Phillips, 48 Penn. 178, 86 Am. Dec. 577, a servitude between two estates is set forth which existed at the time of severance. In the instant case there had never been a servitude in which Lot 6 was the dominant estate and Lot 3 the servient estate at any time while there was a unity of ownership. This is plainly set forth by the plaintiffs' pleadings and plaintiffs' memoranda, and plaintiffs' map or plat.

Plaintiffs' third claim is reasonable necessity. The plaintiffs allege three ditch routes to Lot 6 (see Plat, R. 50) from the same water source, the last by which they claim an easement over Lot 3 existing since 1955 after both parties had received title to their lots. However, under all plaintiffs' pleadings it is apparent that (a) the ditch existing at the time of the dedication of the subdivision in 1947 ("blue" route, R. 50) was discontinued, and (b) the ditch over which this litigation arose in the rear five feet of Lot 3 had never been of benefit to Lot 6 prior to 1955, the first time, according to plaintiffs'

pleadings, that water had come to Lot 6 through this ditch. It is obvious from the plaintiffs' plat and from their pleadings that a more reasonable route for the water from its source to Lot 6 is on the original or "blue" route (R. 50) wherein it involves only two lots in Block 1, a much shorter route than the "red" route or the "black" route set forth by the plaintiffs.

As to the question of a utility easement, the plaintiffs as a sideline attempt to claim that the portion of each lot, to wit, the rear five feet reserved as a utility easement was intended and should be construed as containing a ditch for irrigation water. Holladay Heights Plat "A" in its dedication carried the reservation of a five foot utility easement at the rear of each lot and between Lots 7 and 8 of Block 1. Plaintiffs' Plat with the various ditch routes (R. 50) sets forth graphically that the "blue" or original route existing at the time of dedication of the subdivision is the logical route for the way of necessity to Lot 6 and obviates the claim of necessity for the ditch in litigation.

If their claim that the utility easements contemplated irrigation water as a utility was valid, the easements between Lots 7 and 8 of Block 1, Holladay Heights Plat "A", would be just as available and more convenient by several hundred feet than either the "red" or the "black" route, and by plaintiffs' own pleadings this was the source of water to the ground encompassed by Lot 6 for some thirty-five years prior to 1950 and also at the time of dedication of the subdivision in 1947. True, the

"black" route claimed by the plaintiff is the only route which would obviate the necessity of a ditch across plaintiffs' own Lot 6, or does the plaintiff contend that Lots 7 and 8 of Block 1 are entitled to have an easement across Lot 6, Block 2, because at the time of dedication of the subdivision in 1947 water ran in a ditch from Lots 7 and 8 to Lot 6, Block 2.

POINT II

THE DISTRICT COURT DID NOT ERR IN REFUSING TO PERMIT PLAINTIFFS TO AMEND THEIR COMPLAINT FOLLOWING SUMMARY JUDGMENT.

The plaintiffs contend that their motion to set aside the summary judgment was timely due to notification by mail on July 31, 1959, and that notice by mail extends the time for three days under U.R.C.P. 1953. However, they forget that the Utah Rules of Civil Procedure 1953 do not require notice of entry of judgment. Rule 59(b) provides that a motion for new trial shall be served within ten days of entry of judgment and differs from 104-40-4, Utah Code Annotated 1943 in that the present rule requires no notice of entry of judgment in an action not tried to a jury.

Plaintiffs' motions for new trial, to amend, and to maintain the status quo were not timely but were denied by the court on their own merits rather than the matter of time.

Plaintiff filed two second amended complaints but never obtained leave of court for such filing in accordance with Rule 15(a), Utah Rules of Civil Procedure

1953 (see order dated August 11, 1959, R. 27-28.).

While defendants agree that amendments should be liberally allowed in the interests of justice and on timely application, it is apparent from the record in the case at bar that application was not made for the second amended complaint nor for the amended complaint in lieu of the second amended complaint until after judgment had been entered by Judge Hanson and after time for filing for new trial had expired. The pleadings as a whole, including the second amended complaint do not state a cause of action, and a cause of action cannot be stated in the instant case. By plaintiffs' own pleadings it is apparent that there has never been a servitude in Lot 3 with Lot 6 being a dominant estate, and the time that the contested portion of the ditch has been used is not sufficient to create either a prescriptive right or a right by adverse possession, and plaintiffs' pleadings further show (as does their plat) that there is no right-of-way by reasonable necessity.

CONCLUSION

Therefore, it is urged that the lower court's summary judgment be affirmed and defendants and respondents be granted their costs.

Respectfully submitted,

SUMNER J. HATCH
Attorney for Defendants and Respondents
409 Boston Building
Salt Lake City 11, Utah